

1 SCOTT N. SCHOOLS, SC SBN 9990
United States Attorney
2 JOANN M. SWANSON, CSBN 88143
Assistant United States Attorney
3 Chief, Civil Division
ILA C. DEISS, NY SBN 3052909
4 Assistant United States Attorney

5 450 Golden Gate Avenue, Box 36055
6 San Francisco, California 94102
Telephone: (415) 436-7124
FAX: (415) 436-7169

Attorneys for Respondents

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

I. INTRODUCTION

Petitioner Jesus Valdez Bermudez, a criminal alien, detained on behalf of the United States Immigration and Custom Enforcement (“ICE”), has filed this *pro se* petition for a writ of habeas corpus under 28 USC § 2241, challenging the denial of his application for release on bail pending removal proceedings. Petitioner was ordered removed by the Board of Immigration Appeals (“BIA”) on February 9, 2007. Petitioner timely appealed that decision to the Ninth Circuit Court of Appeals, Petition for Review No. 07-70733. A stay of removal was granted by the Ninth Circuit on July 26, 2007.

Respondents hereby respond to the Court's July 24, 2007 Order to Show Cause and oppose the

1 habeas petition.

2 II. BACKGROUND

3 Petitioner last entered the United States on or about September 18, 1984, as an immigrant. *See*
 4 Declaration of Ila C. Deiss (“Deiss Decl.”), Exhibit 1. In 1985, Petitioner was convicted of credit
 5 card forgery. *Id.* In 1994, he was convicted of grand theft. *Id.* In 2001, he was convicted of
 6 second-degree burglary and attempted forgery and sentenced to prison for two years. *Id.* In 2002,
 7 he was convicted of forgery and receiving stolen property. *Id.* He received three years
 8 consecutive sentences on each of the 2002 counts. *Id.*

9 In 2002, the former Immigration and Nationality Service placed Petitioner in removal
 10 proceedings by serving him with a Notice to Appear (“NTA”). Deiss Decl., Exhibit 1. Petitioner
 11 was charged with, among other things, being removable under INA § 237(a)(2)(A)(iii), 8 U.S.C.
 12 1227(a)(2)(A)(iii), because he had been charged with aggravated felonies as defined in sections 8
 13 U.S.C. §§ 101(a)(43)(G) and (R). *Id.*

14 On May 1, 2006, the Immigration Judge (“IJ”) denied Petitioner’s requests for relief from
 15 removal, finding him to be an aggravated felon, ordered Petitioner removed, and denied Petitioner
 16 release on bond. Deiss Decl., Exhibit 2. Petitioner timely appealed to the Board of Immigration
 17 Appeals (“BIA”) and, on February 9, 2007, the BIA upheld the IJ’s order of removal and denial of
 18 release on bond. Deiss Decl., Exhibit 3. The BIA found no fault in the IJ’s finding that
 19 Petitioner’s conviction of an offense relating to forgery for which he received a sentence of three
 20 years’ imprisonment alone constituted an aggravated felony and sufficient basis for removal. *Id.*

21 On February 23, 2007, Petitioner timely appealed to the Ninth Circuit Court of Appeals and
 22 moved for a stay of removal. Deiss Decl., Exhibit 4. On July 26, 2007, the Ninth Circuit granted
 23 Petitioner’s motion for a stay of removal. *Id.* On September 13, 2007, the Ninth Circuit denied
 24 Petitioner’s request for release pending appeal. *Id.*

25 On May 10, 2007, Petitioner was served with a Decision to Continue Detention Following File
 26 Review, whereby ICE determined to continue detention pending review of Petitioner’s final
 27 administrative order of removal by the Ninth Circuit Court of Appeals. Deiss Decl., Exhibit 5.

28 On May 29, 2007, Petitioner filed this habeas petition under 28 U.S.C. §2241, arguing that his

1 detention is indefinite. Petitioner also argues that none of his convictions were aggravated
 2 felonies or crimes of moral turpitude and, therefore, he should have been entitled to independent
 3 bail hearings.

4 Petitioner moved the IJ for what the IJ construed as a bond redetermination. Deiss Decl.,
 5 Exhibit 6. On July 25, 2007, the IJ denied Petitioner's motion, finding that he had no jurisdiction
 6 of such a request because Petitioner has been convicted of an aggravated felony, namely a forgery
 7 offense with a sentence of at least one year. *Id.*

8 On July 24, 2007, this Court dismissed one of Petitioner's petitions as duplicative and
 9 dismissed any "claims that his continued detention pending deportation is unlawful as duplicative
 10 of his earlier action raising the same claim." July 24, 2007 Order at 3.

11 III. LEGAL STANDARDS

12 This Court may entertain a petition for a writ of habeas corpus from a person claiming to be "in
 13 custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.
 14 2241(c)(3).

15 The limits on district court federal habeas corpus jurisdiction introduced by the REAL ID Act
 16 apply only to challenges of orders of removal. *See id.* § 106(a)(1), 119 Stat. at 310 (a petition for
 17 review shall be the "sole and exclusive means for judicial review of an order of removal")
 18 (emphasis added). Legislative history confirms that the REAL ID Act does not divest district
 19 courts of habeas review over other claims: "section 106 will not preclude habeas review over
 20 challenges to detention that are independent of challenges to removal orders. Instead, the bill
 21 would eliminate habeas review only over challenges to removal orders." H. R. Rep. No. 109-72
 22 (2005).

23 IV. ARGUMENT

24 A. **Petitioner Was Convicted of an Aggravated Felony for the Purposes of 25 Removal Proceedings**

26 As an initial matter, to the extent Petitioner is challenging whether his convictions are
 27 aggravated felonies, such claims properly belong, and are, with the Ninth Circuit Court of Appeals
 28 under 8 U.S.C. § 1252, as amended by the REAL ID Act. *See Morales-Alegria v. Gonzales*, 449

1 F.3d 1051, 1053 (9th Cir. 2006) (reviewing *de novo* and holding that a conviction for forgery
 2 under Cal. Penal Code § 476(c) is an aggravated felony for the purposes of removal proceedings).

3 In any event, pursuant to INA section 237(a)(2)(A)(iii), an alien who, at any time after
 4 admission, is convicted of an aggravated felony-defined to include “an offense relating to . . .
 5 forgery . . . for which the term of imprisonment is at least one year,” 8 U.S.C. § 1101(a)(43)(R) -
 6 may be removed from the country. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). The government charged
 7 Petitioner with removability for having committed an aggravated felony for which he was
 8 sentenced to more than one year. Deiss Decl., Exhibit 1. The ultimate basis for the removal was
 9 his prior conviction under California Penal Code § 475, entitled, “Forgery; possession or receipt of
 10 items; intent to defraud” which satisfies 8 U.S.C. § 1101(a)(43)(R).¹ Deiss Decl., Exhibit 3.

11 B. Petitioner is Being Lawfully Detained

12 Section 236 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1226, provides the
 13 framework for the arrest, detention, and release of aliens in removal proceedings. Once removal
 14 proceedings have been completed, the detention and release of aliens shifts to INA § 241, 8 U.S.C.
 15 § 1231. The determination of when an alien becomes subject to detention under Section 241
 16 rather than Section 236 is governed by Section 241(a)(1). INA § 241(a)(1)(B) provides that:

17 The removal period begins on the latest of the following:

- 18 (i) The date the order of removal becomes administratively final.
- 19 (ii) If the removal order is judicially reviewed and if a court orders a stay of the
 removal of the alien, the date of the court's final order.
- 20 (iii) If the alien is detained or confined (except under an immigration process), the
 date the alien is released from detention or confinement.

21 8 U.S.C. § 1231(a)(1)(B). Thus, pursuant to Section 241(a)(1)(B)(ii), where a court issues a stay
 22 of removal pending its review of an administrative removal order, the alien continues to be
 23 detained under Section 236 until the court renders its decision. *See Ma v. Ashcroft*, 257 F.3d 1095,
 24 1104 n. 12 (9th Cir. 2001) (stating, “[i]f the removal order is stayed pending judicial review, the

25
 26 ¹Cal. Penal Code 475(c) reads:
 27 Every person who possesses any completed check, money order, traveler's check,
 warrant or county order, whether real or fictitious, with the intent to utter or pass
 or facilitate the utterance or passage of the same, in order to defraud any person, is
 guilty of forgery.

1 ninety day period begins running after the reviewing court's final order."). Here, as noted above,
 2 the Ninth Circuit issued a stay of removal pending its review of Petitioner's removal order in July
 3 2007, and the petition for review remains pending. Deiss Decl., Exhibit 4.

4 Therefore, as the removal period has not yet begun, Petitioner's detention is arguably still
 5 governed by INA § 236. Section 236(c)(1), 8 U.S.C. § 1226(c) directs the Attorney General to
 6 take into custody any alien who:

- 7 (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2)
 of this title,
- 8 (B) is deportable by reason of having committed any offense covered in section
 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
- 9 (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for
 which the alien has been sentenced [sic] to a term of imprisonment of at least 1 year, or
- 10 (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section
 1227(a)(4)(B) of this title, when the alien is released . . .

11
 12 INA § 236(c), 8 U.S.C. § 1226(c). Petitioner is being detained pursuant to INA § 236(c)(1)(B)
 13 because his conviction under California Penal Code § 475(c) constituted an aggravated felony.

14 **C. Petitioner's Due Process Rights Were Not Violated²**

15 Petitioner argues that his Due Process rights were violated because he did not receive a fair
 16 hearing on his application for bail pending removal proceedings. It is undisputed that "the Due
 17 Process Clause applies to all 'persons' within the United States, including aliens, whether their
 18 presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678
 19 (2001). Furthermore, an alien's freedom from imprisonment "lies at the heart of the liberty that

20
 21 ²To the extent Petitioner argues that he is being held indefinitely in violation of *Zadvydas*,
 22 533 U.S. at 678, this Court dismissed those claims. See July 24, 2007 Order at 3. In any event,
 23 Petitioner's reliance on *Zadvydas* is misplaced because, as discussed above, the 90-day removal
 24 period has not yet commenced. Moreover, Petitioner has not demonstrated that his removal is
 25 not significantly likely in the reasonably foreseeable future. Rather, the only thing preventing
 26 petitioner's removal is his Petition for Review and related stay of removal. Once the Ninth
 27 Circuit decides his appeal, ICE will remove or release petitioner. See *Cruz-Ortiz v. Gonzales*,
 28 221 Fed. Appx. 531, 2007 WL 580670 (9th Cir. Feb. 2007)(holding that detention during the
 appeal of a final removal order is voluntary if a stay of removal is requested by petitioner). Thus,
 contrary to the petitioner in *Zadvydas*, Petitioner's detention is neither "indefinite" nor
 "potentially permanent." *Zadvydas*, 533 U.S. at 690-91. Accordingly, Petitioner has failed to
 make a threshold showing of indefinite detention.

1 Clause protects .” *Id.* at 690. The Supreme Court has specifically recognized, however, that
 2 detention during removal proceedings is a constitutionally permissible part of that process.
 3 *Demore v. Kim*, 538 U.S. 510, 523 (2003) (holding that the mandatory detention of criminal aliens
 4 during removal proceedings under INA § 236(c) is constitutionally valid even where there has
 5 been no individualized determination as to the alien's risk of flight and dangerousness to the
 6 community).

7 After ICE takes an alien into custody and orders him mandatorily detained under § 1226(c), a
 8 “*Joseph* hearing” before an IJ is “immediately provided” if the alien claims he is not covered by
 9 mandatory detention as provided in INA § 236(c), 8 U.S.C. § 1226(c). *Demore v. Kim*, 538 U.S. at
 10 514 n. 3; *see also* 8 C.F.R. §§ 236.1(d)(1) & 1236.1(d)(1) (explaining that an IJ may redetermine
 11 the initial custody and bond determination of the district director any time before a final
 12 deportation order); § 1003.19(h)(1)(ii) (providing that an alien may seek a “determination by an
 13 immigration judge that the alien is not properly included” within § 1226(c)). “At the hearing, the
 14 detainee may avoid mandatory detention by demonstrating that he is not an alien, was not
 15 convicted of the predicate crime, or that the INS is otherwise substantially unlikely to establish
 16 that he is in fact subject to mandatory detention.” *Kim*, 538 U.S. at 514 n. 3 (citations omitted).
 17 Per *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999), a *Joseph* hearing provides an alien “the
 18 opportunity to offer evidence and legal authority on the question whether the Service has properly
 19 included him within a category that is subject to mandatory detention.” *Id.*

20 “If the IJ determines the alien does fall within § 1226(c), then he is without authority to
 21 conduct an individualized bond determination.” *See* 8 C.F.R. § 1003.19(h)(1)(i)(E). Here, the IJ
 22 squarely found that Petitioner was removable because of his conviction of an aggravated felony,
 23 and found that he fell within the ambit of mandatory detention. Deiss Decl., Exhibit 2. The
 24 finding that Petitioner was removable as an aggravated felon was upheld by the BIA. Deiss Decl.,
 25 Exhibit 3.

26 With regards to his subsequent application for bond before the IJ, Deiss Decl., Exhibit 6, once
 27 Petitioner's removal order became final in February 2007, the IJ and the BIA no longer had
 28 jurisdiction over his custody determination. *See* 8 C.F.R. § 236.1(d)(1) (immigration judges have

1 jurisdiction to review the district director's initial custody determination "at any time before an
2 order under 8 CFR § 1240 becomes final"); *see also In re Valles-Perez*, 21 I. & N. Dec. 769, 772,
3 1997 WL 80986 (BIA 1997) ("[Indeed,] an Immigration Judge is divested of jurisdiction over a
4 bond proceeding . . . upon the entry of an administratively final order of deportation."). Petitioner
5 is not eligible for release on bond. Thus, Petitioner's detention meets due process requirements.

6 V. CONCLUSION

7 For the foregoing reasons, the petition for a writ of habeas corpus should be denied.

8
9 DATED: September 24, 2007

Respectfully submitted,

10 SCOTT N. SCHOOLS
11 United States Attorney

12 _____/s/
13 ILA C. DEISS
14 Assistant United States Attorney
15 Attorneys for Respondents